

STATE OF MICHIGAN
COURT OF APPEALS

SARA ALLEN,

Plaintiff-Appellant,

v

UNITED AMBULANCE SERVICE, LESLIE
AYERS, and B.I.S., INC. OHIO, a/k/a B.I.S., INC.,

Defendants-Appellees.

UNPUBLISHED

May 8, 1998

No. 191652

Wayne Circuit Court

LC No. 94-406046-CK

SARA ALLEN,

Plaintiff-Appellee,

v

UNITED AMBULANCE SERVICE,

Defendant,

and

B.I.S. INC. OHIO, a/k/a B.I.S., INC.,

Defendant-Appellee,

and

LESLIE AYERS,

Defendant-Appellant.

No. 191662

Wayne Circuit Court

LC No. 94-406046-CK

SARA ALLEN,

Plaintiff-Appellee,

v

UNITED AMBULANCE SERVICE and LESLIE
AYERS,

Defendants-Appellees,

and

B.I.S. INC. OHIO, a/k/a B.I.S., INC.,

Defendant-Appellant.

No. 191706

Wayne Circuit Court

LC No. 94-406046-CK

Before: O'Connell, P.J., and Gribbs and Smolenski, JJ.

PER CURIAM.

Plaintiff brought this action under the Civil Rights Act, MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq.*, for discrimination based on sexual harassment. The jury rendered a verdict in favor of plaintiff and against defendants BIS and Ayers, and the trial court awarded plaintiff attorney fees and costs. In Docket No. 191652, plaintiff appeals as of right from the trial court's earlier grant of summary disposition to United Ambulance Service (United). In Docket No. 191706, BIS appeals as of right from the award of attorney fees and costs and the grant of summary disposition in favor of United. In Docket No. 191662, defendant Ayers appeals as of right from the jury's verdict and the award of attorney fees and costs to plaintiff. We affirm.

Plaintiff, an EMT/dispatcher, alleges that she worked for both United and BIS. Plaintiff was supervised by Ayers. She claimed that Ayers verbally and sexually harassed her and that this harassment created a hostile work environment. Plaintiff sought damages under the Civil Rights Act as well as damages for intentional infliction of emotional distress and assault and battery. Plaintiff succeeded on her claims of battery and sexual harassment and was awarded over \$19,000 in economic damages.

The parties disputed by whom plaintiff was employed. At one time, plaintiff and other employees were employed directly by United. However, BIS and United entered into a lease agreement in 1992, in which virtually all United's previous employees were leased to United by BIS.

United moved for and was granted summary disposition on the ground that it had no employees and was not plaintiff's employer. Plaintiff claims this decision was erroneous. We disagree.

This Court has adopted the economic reality test for the determination of a plaintiff's employer in civil rights cases. *McCarthy v State Farm Ins Co*, 170 Mich App 451, 455; 428 NW2d 692 (1988). The four basic factors to be considered when determining whether an entity is the plaintiff's employer are: (1) control of the worker's duties; (2) payment of wages; (3) the right to hire, fire, and discipline; and (4) performance of the duties toward the accomplishment of a common goal. *Hoste v Shanty Creek Mgmt Co*, 221 Mich App 144, 149; 561 NW2d 106 (1997). The totality of the circumstances surrounding the work is examined when the factors are considered, and no single factor controls the determination. *Id.* Here, although there is serious dispute about the conclusion to be drawn from the underlying facts, the facts themselves are not in dispute. Accordingly, this matter presents a question of law for the courts to resolve. *Smith v Martindale*, 81 Mich App 682; 266 NW2d 49 (1978).

The trial court correctly noted that plaintiff's evidence that certain employees held themselves out as United employees was not persuasive under the economic reality test. There was evidence, presented through depositions, that Ayers was a BIS employee and that Robert Rutledge was a BIS employee. This evidence established that Rutledge was responsible for employment decisions, policies, reports, applications and discipline. He was designated as manager of personnel for BIS, was hired by BIS as general manager and handled its operations. Plaintiff stated that she reported to Ayers and Rutledge. The lease agreement between United and BIS provided that BIS was responsible for hiring, firing, disciplining and regulating the working conditions and labor policies of the employees. Plaintiff's W-2 statement indicated that BIS was her employer. The lease agreement provided that BIS was responsible for payroll and was the employer. BIS was also responsible for making income tax, social security, unemployment and disability insurance payments.

Finally, the evidence indicates that United was engaged in the business of providing ambulance services. Plaintiff worked as an EMT/dispatcher, which furthered the goal of providing ambulance services. The evidence suggests that BIS was simply a payroll/employee leasing company.

Considering all the evidence in favor of plaintiff, the non-moving party, only the fourth factor, performance of duties toward accomplishment of a common goal, weighs in favor of finding that United rather than BIS was plaintiff's employer. Considering the totality of the circumstances, summary disposition in favor of United was appropriate under the facts of this case.

Next, defendant Ayers argues that certain evidence should have been admitted. We disagree. The trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *Koenig v South Haven*, 221 Mich App 711, 724; 562 NW2d 509 (1997).

The challenged evidence pertained to an incident that occurred between plaintiff and another employee that resulted in the termination of the other employee. Ayers sought admission of this evidence to demonstrate that defendants took prompt action upon learning of plaintiff's claims. An employer may avoid liability for a sexual discrimination claim based on a hostile work environment if it

adequately investigated and took prompt and remedial action upon notice of the

alleged hostile work environment. *Bradley v Philip Morris, Inc.*, 194 Mich App 44, 48-49; 486 NW2d 48 (1991), vacated in part on other grounds and remanded 440 Mich 870 (1992), citing *Downer v Detroit Receiving Hosp.*, 191 Mich App 232; 477 NW2d 146 (1991). In this case, Ayers asserts that defendants' response to the earlier claim by plaintiff against a different person is relevant to defendants' response to the instant claim. However, the proper focus is not upon the defendant's past practices regarding the hostile work environment caused by past incidences of sexual harassment, but rather the defendant's response to the hostile work environment created as a result of the sexual harassment that forms the basis of the plaintiff's complaint leading to the action at issue.

The two situations in this case are separate and involved different individuals. The evidence sought to be admitted was not relevant to the instant matter. The trial court did not abuse its discretion in excluding the evidence.

Defendants BIS and Ayers also challenge as excessive the trial court's award of approximately \$42,000 in attorney fees and costs. This Court reviews the award of fees for an abuse of discretion. *Shanafelt v Allstate Ins Co*, 217 Mich App 625, 634; 552 NW2d 671 (1996).

An award of attorney fees is permitted under the Civil Rights Act if the trial court finds the award appropriate. MCL 37.2802; MSA 3.548(802). The trial court should consider a list of factors and guidelines as set out in *Wood v DAIIE*, 413 Mich 573, 588; 321 NW2d 653 (1982), to determine the reasonable amount of fees if it decides to make an award. *Howard v Canteen Corp.*, 192 Mich App 427, 437; 481 NW2d 718 (1991). The nonexclusive list of factors includes: (1) the professional standing and experience of the attorney; (2) the skill, time and labor involved; (3) the amount in question and the results achieved; (4) the difficulty of the case; (5) the expenses incurred; and (6) the nature and length of the professional relationship with the client. *Wood, supra*, quoting *Crawley v Schick*, 48 Mich App 728, 737; 211 NW2d 217 (1973). The trial court must make findings of fact on the attorney fee issue, but it need not detail its findings regarding each of the factors. *Id.*

When the reasonableness of the requested fees or rates is challenged, the trial court should hold an evidentiary hearing. *Howard, supra* at 438. If there is a dispute regarding the number of hours spent in preparing the case, the trial court should make factual findings. *Id.*

Contrary to BIS' contention, the trial court held an evidentiary hearing on plaintiff's request for fees and costs. The trial court adjusted plaintiff's requested hourly rate after consideration of the *Wood* factors. It adjusted it downward on the basis of the nature of the case and the result obtained. Although the jury did not award plaintiff her desired damages, it found that prohibited conduct did occur. Based on this, the court awarded plaintiff a rate of \$125 an hour, which was between the rate sought by defendants (\$105 an hour) and that sought by plaintiff (\$150 an hour). Thus, this claim by defendant BIS does not provide a basis for relief.

Defendants further argue that, based on this hourly rate, the award is excessive in light of the result obtained. They urge this Court to consider *Collister v Sunshine Food Stores, Inc.*, 166 Mich App 272; 419 NW2d 781 (1988), where the Court found the plaintiff's requested fees and costs excessive because plaintiff succeeded on only one of seven theories of liability. We recognize that "the

degree of plaintiff's success is a 'crucial' factor in determining a proper award for attorney fees," *Id.* at 275, citing *Hensley v Eckerhart*, 461 US 424; 103 S Ct 1933; 76 L Ed 2d 40 (1983), however, we note that the trial court did consider this in fashioning its award. Unlike in *Collister*, plaintiff here prevailed on the majority of her claims. Nor does the existence of a contingency fee agreement preclude an award of attorney fees under the Civil Rights Act. *Wilson v General Motors Corp*, 183 Mich App 21, 42; 454 NW2d 405 (1990). The parties here stipulated the number of hours for which plaintiff's counsel should be awarded her fees. Defendants are not entitled to relief on the basis of this claim.

Plaintiff seeks attorney fees for this appeal. The Civil Rights Act allows for an award of appellate attorney fees. *McLemore v Detroit Receiving Hosp & Univ Med Center*, 196 Mich App 391, 402-403; 493 NW2d 441 (1992). However, such an award is discretionary. *Id.* at 403. We decline to award plaintiff attorney fees for this appeal.

BIS next argues that the trial court should not have granted United's motion for summary disposition because there existed a conflict of interest.

We need not address this issue, which BIS raises for the first time on appeal. *McCready v Hoffius*, 222 Mich App 210, 218-219; 564 NW2d 493 (1997). In any event, we are not convinced that the alleged conflict in this case led to an improper result. *Id.* In its appellate brief, BIS adopts plaintiff's statement of facts and conclusions concerning whether summary disposition was properly entered in this case. As noted previously, the question of plaintiff's employer was a matter of law which the trial court correctly decided. Reversal is not required on this basis.

Affirmed.

/s/ Peter D. O'Connell
/s/ Roman S. Gibbs
/s/ Michael R. Smolenski